DATE: June 26, 1996
CASE NO. 91-ERA-12

IN THE MATTER OF

DOUGLAS E. BILLINGS,

PLAINTIFF,

v.

TENNESSEE VALLEY AUTHORITY,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF DISMISSAL

Before the Administrative Review Board (ARB) for review are the January 9, 1991 [Recommended] Order of Dismissal (R.O.), the January 9, 1991 Order denying recusal or remand to the Wage and Hour Division of the U.S. Department Of Labor for further investigation, and the June 19, 1992 Recommended Decision and Order on Remand (Remand Decision) of the Administrative Law Judge (ALJ) under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and regulations at 29 C.F.R. Part 24 (1995).[1] We agree with the ALJ's refusal to recuse himself or remand the case to the Wage and Hour Division and his recommendations that the complaint be dismissed with prejudice.[2]

BACKGROUND

On August 18, 1990, Douglas E. Billings (Billings) filed an ERA complaint with the Office of the Administrator, Wage and Hour Division, which stated, in pertinent part:

The identified persons [[3]] have conspired to deprive

Douglas E. Billings of [workers' compensation] benefits as afforded under Title 5 U.S.C. § 8101-8151 [the Federal Employees' Compensation Act (FECA)]. In doing so the persons named have caused Douglas Billings to suffer great mental and physical stress.

> On August 2, 1990, Douglas Billings became aware that the Tennessee Valley Authority through their Inspector Generals [sic] Office had contacted the Office of Workers' Compensation Programs [OWCP] [sic] Chief of Claims in Jacksonville, Florida.
>
> Mr. George T. Prosser for the IG's office begged the Chief of Claims to terminate Douglas Billings [sic] compensation payments that he was receiving for permanent total disability.
>
> Mr. Bennett, the Chief of Claims co-operated [sic] and terminated Douglas Billings [sic] benefits illegally.

The District Director of the Nashville office of the Wage and Hour Division notified Billings on November 26, 1990 that its investigation "did not verify that discrimination [under] the statute could be substantiated for the following reasons: Our investigation revealed no evidence that the efforts by TVA to reduce and/or terminate your OWCP payments were due to discrimination under the ERA. TVA had an obligation to notify OWCP of possible improper payments." Billings appealed this finding by requesting a hearing before an ALJ.

The ALJ issued an Order denying Billings' request for recusal or remand to the Wage and Hour Division and a R. O. dismissing the case with prejudice. The ALJ's dismissal of Billings' complaint was based upon the following reasons:

> 1. The basis of the complaint concerns contacts and discussions between TVA employees and other officials which come within First Amendment protections.
>
> 2. The basis of the complaint was previously litigated in Nos. 89-ERA-16 and 90-ERA-18. These two complaints were previously litigated and the complaints dismissed [by the same ALJ in the instant case]. [[4]] Any further litigation of these same complaints is barred by the principle of res judicata.
>
> 3. The Plaintiff has failed to comply with an Order directing him to file a prehearing statement on or before December 28, 1990. The Order provided notice to

---

[PAGE 3]

> the parties that failure to comply may result in dismissal of the proceeding. The plaintiff has ignored the Order since he has not filed a prehearing statement or requested an extension of time for compliance.

R. O. at 2.

The Secretary's Order of Remand, Apr. 9, 1992, found that the ALJ's notice of possible dismissal in his Notice of Hearing and Prehearing Order was inconsistent with the procedure in ERA regulations at 29 C.F.R. § 24.5(e)(4), which provides that an ALJ's dismissal of a claim requires a prior "order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." Upon remand

to the ALJ for compliance with 29 C.F.R. § 24.5(e)(4), the ALJ's Remand

Decision, June 19, 1992, reaffirmed his previous R. O. and stated in pertinent part:

> I have reviewed the Plaintiff's response to the Show Cause Order and find that his response is not sufficient to prevent dismissal of this case. Plaintiff has given no reason for his failure to respond to the Prehearing Order and I find that this fact alone is sufficient cause for dismissal of his complaint. Additionally, the basis of his complaint was the subject of the complaints in 89-ERA-16 and 90-ERA-18 and further litigation is barred by the principle of res judicata. Further, the basis of the complaint concerns contacts and discussions between TVA employees and other officials which come within First Amendment protections.

Remand Decision at 2.

DISCUSSION

I. *Recusal or Remand to Wage and Hour Division for Further Investigation*

We agree with the ALJ's Order denying recusal. *Id.* at 2; 29 C.F.R. § 18.31. Billings' recusal motion never demonstrated that the ALJ "ha[d] a personal bias or prejudice either against him or in favor of any adverse party," 28 U.S.C. § 144, or that "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or that "he ha[d] a personal bias or prejudice concerning a party," 28 U.S.C. § 455(b)(1).

Under 28 U.S.C. § 144, a judge is presumed to be impartial, and a substantial burden is imposed on the requesting party to prove otherwise. *Bin-Wahad v. Coughlin*, 853 F.Supp. 680, 683 (S.D.N.Y. 1994); *Holt v. KMI Continental, Inc.*, 821 F.Supp. 846, 847 (D. Conn. 1993); *U.S. v. Fiat Motors of North America, Inc.*,

---

[PAGE 4]

512 F.Supp. 247, 251 (D.D.C. 1981); *U.S. v. Mitchell*, 377 F.Supp. 1312, 1316 (D.D.C. 1974), *aff'd sub nom. U.S. v. Haldeman*, 559 F.2d 31, 129-36 (D.C. Cir. 1976), *cert. denied sub nom. Mitchell v. U.S.*, 431 U.S. 933 (1977).

Billings' recusal motion is based on allegations that the ALJ "has shown in the past ERA actions before him, that he does not intend to grant Billings Equal Access to Justice as he is allowed under the Equal Access to Justice Act." *Id.* at 1-2. Absent specific allegations of personal bias or prejudice, neither prior adverse rulings of a judge nor his participation in a related or prior proceeding are sufficient for recusal under 28 U.S.C. § 144. *U.S. v. Merkt*, 794 F.2d 950, 960-61 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981); *Verone v. Taconic Telephone Corp.*, 826 F.Supp. 632, 634-35 (N.D.N.Y. 1993); *Bumpus v. Uniroyal Tire Co.*, 385 F.Supp. 711, 713-14 (E.D. Pa. 1974). Adverse rulings in previous proceedings, whether correct or erroneous, involving the same judge and the party requesting recusal, are an insufficient basis for recusal. *Barnes v. U.S.*, 241 F.2d 252, 254 (9th Cir.

1956); *Travelers Insurance Co. v. St. Jude Medical Office Bldg., Ltd. Partnership*, 843 F.Supp. 138, 141-44 (E.D. La. 1994); *Crider v. Keohane*, 484 F.Supp. 13, 15 (W.D. Okl. 1979); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 513-18 (D.S.C. 1975); *U.S. v. Partin*, 312 F.Supp. 1355, 1358 (E.D. La. 1970).

Similarly, under 28 U.S.C. § 455(a), opinions held by judges as a result of what they learned in earlier proceedings are not bias or prejudice requiring recusal, and it is normal and proper for a judge to sit in the same case upon remand and successive trials involving the same defendant. *Liteky v. U.S.*, 114 S.Ct. 1147, 1157-58 (1994); *In Re International Business Machines Corp.*, 45 F.3d 641, 643-44 (2nd Cir. 1995). The source of the appearance of partiality must arise from something other than the judge's mere involvement in previous cases concerning the parties in the present case. *U.S. v. Morris*, 988 F.2d 1335, 1337 (4th Cir. 1993); *Meyer v. Oppenheimer Management Corp.*, 709 F. Supp. 67, 68-69 (S.D.N.Y. 1989).

Accordingly, we agree with the ALJ's order denying recusal since he properly found that Billings "merely recites allegations and complaints from previous cases [involving Billings and the same ALJ in this case] and has not shown nor demonstrated any facts which would tend to show bias or prejudice, personal or otherwise, against the plaintiff or in favor of an adverse party." *Id.* at 2. *Billings v. TVA*, Case Nos. 89-ERA-16 *et seq.*, Sec. Fin. Dec. and Ord., July 29, 1992, slip op. at 2-3 (upholding this ALJ's denial of recusal in other cases brought by

---

[PAGE 5]
Billings against TVA), *review denied sub nom. Billings v. Reich and TVA*, 25 F.3d 1047 (6th Cir. 1994).
See n.4, *supra*.

We also agree with the ALJ's holding that "plaintiff's alternative request for remand [to the Wage and Hour Division for further investigation] must also be denied as he has not shown any legitimate reason why a remand is necessary." *Id.* at 2. Billings' recusal and remand motion did not demonstrate that the Wage-Hour investigation was inconsistent with appropriate investigatory procedures. See 29 C.F.R. § 24.4. Rather, his remand request attacked the merits of Wage-Hour's findings of nondiscrimination in his case, arguing that "the Wage and Hour Division did not name the Employee's [sic] Compensation Appeals Board and the Secretary of Labor as co-conspirators with TVA and OWCP in the withholding of benefits and due process of law." *Id.* at 2.

Wage-Hour's findings were not binding on Billings since the regulations accorded him a right to a *de novo* hearing on the merits of his complaint, including providing testimony from his own witnesses and documentary evidence in support of his allegations. 29 C.F.R. §§ 24.4-24.5. Accordingly, any arguable flaws in Wage-Hour's investigation[5] or findings would not adversely affect litigation of his case before the ALJ. *Smith v. TVA*, Case No. 87-ERA-20, Sec. Fin. Ord. of Dism., Apr. 27, 1990, slip op. at 4 n.2.

II. *Dismissal for Failure to Respond to Prehearing Order*

The ALJ's April 16, 1992 Order to Show Cause, issued pursuant to the Secretary's Order of Remand, ordered the parties to "SHOW CAUSE . . . why the . . . case should not be dismissed due to the failure of the Plaintiff . . . to comply with the prehearing order dated December 12, 1990. . . ." That Notice of Hearing and Prehearing Order required the parties to submit to the ALJ and to each other:

> (a) A statement of the issues to be decided with citation of relevant case law and applicable provisions of law;
>
> (b) The name and address of each witness the party expects to call with a summary of the testimony each witness is expected to furnish and an estimate as to the length of time his testimony will take;
>
> (c) A joint stipulation of facts and documents which are not in dispute.
>
> (d) A list of all documents which the party expects to introduce as evidence with a copy of each

---

[PAGE 6]

> document when possible;
>
> (e) All preliminary motions and a statement of objections expected to be made to any proposed exhibits; and
>
> (f) An estimate as to the length of time required for hearing.

Id. at 1-2.

We agree with the ALJ's Remand Decision that Billings' May 13, 1992 Response to [the] Order to Show Cause "has given no reason for his failure to respond to the Prehearing Order and . . . [I] find that this fact alone is sufficient cause for dismissal of his complaint." *Id.* at 2. Billings' response avoids the issue completely, arguing instead that the ALJ "does not want Plaintiff . . . to have the opportunity to be allowed to have the same Fifth and Fourteenth Amendment Rights . . . as all other Plaintiff's [sic] who have brought actions against TVA have because he does not and cannot afford an Attorney to pursue this action." Billings goes on to request that "the case be remanded back to the Wage and Hour Division for a *Proper* [sic] investigation of the facts." *Id.* at 1-2 (emphasis in original).[6]

Billings' response to the show-cause order does not deny that he failed to comply with the ALJ's prehearing order. Accordingly, the ALJ's dismissal of this complaint with prejudice was proper pursuant to 29 C.F.R. § 24.5(e)(4)(i)(B). *Cummings v. Pinkerton's, Inc.*, Case No. 87-ERA-16, Sec. Ord., Sept. 23, 1994, slip op. at 2; *Billings v. Bechtel Group, Bowater Southern Paper Corp.*, Case No. 89-ERA-45, Sec. Fin. Ord. of Dism., Jan. 24, 1994, slip op. at 2; *Billings v.*

TVA, Case Nos. 89-ERA-16 *et seq.*, Sec. Fin. Dec. and Ord., July 29, 1992, slip op. at 3-5, *review denied,* 25 F.3d 1047 (6th Cir. 1994); and cases cited.[7] *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-36 (1962); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651-52 (9th Cir. 1991); *Kadin Corp. v. U.S.*, 782 F.2d 175, 176-77 (Fed. Cir. 1986); *Rohauer v. Eastin-Phelan Corp.*, 499 F.2d 120, 121-22 (8th Cir. 1974) (judicial discretion to dismiss cases for failure to follow court orders).

III. *TVA Communicatons with OWCP*

Billings' complaint objects to contacts and communications between TVA and OWCP resulting in the terminaton of his FECA benefits. As explained in TVA's Dec. 28, 1990 response to the ALJ's Dec. 12, 1990 prehearing order:

> The sole factual issue for resolution in this case is

[PAGE 7]

whether TVA illegally and discriminatorily persuaded OWCP to terminate Billings' FECA benefits. TVA's position is that its actions were constitutionally protected and for the legitimate business purpose of terminating overpayments and investigating potential fraud against the Government. In 1988, as a part of a routine review by TVA of OWCP's charges for benefits paid, TVA became aware that it was being charged improperly for two monthly benefit payments to complainant, one a total disability payment and the other a partial disability payment. During the hearing in No. 87-ERA-5, complainant voluntarily disclosed that while collecting both disability payments he also had other employment. Because complainant had indicated that he had returned to work, and because he was also receiving two monthly benefit checks, neither of which was being reduced on account of his earnings, TVA's Office of Inspector General (OIG) investigated the matter and confirmed that complainant was indeed working for Bechtel Construction Company, Inc., as an operating engineer with earnings at a rate of $20,000 per year. When the matter was brought to OWCP's attention, it correctly terminated complainant's disability payments. Complainant has not yet made repayment for the overpayments which he received.

Id. at 6. *See* n.3 involving Billings' related ECAB case.

We agree with the ALJ that TVA's actions in communicating with OWCP in an attempt to have Billings' eligibility for FECA benefits reviewed did not violate the ERA. Remand Decision at 2; R. O. at 2. TVA's actions were specifically authorized by FECA regulations, which provide, in pertinent part:

> [T]he employing agency may . . . investigate the circumstances surrounding an injury to an employee and the extent of disability (*e.g., an agency may investigate an employee's activities where it appears the employee alleging total disability may be performing other employment or may be engaging in activities which would indicate less than total disability). Further, the agency has the responsibility to submit to the Office at any time all relevant and probative factual and medical evidence in its possession or which it may acquire through investigation or other means.* All evidence

> submitted will be considered and acted upon by the Office as appropriate, and the Office will inform theclaimant, the claimant's representative and the employing agency of such action. . . .

20 C.F.R. § 10.140 (1988)(emphasis added). *See Howard v. TVA*, Case No. 90-ERA-24, Sec. Fin. Dec. and Ord. of Dism., July 3,

---

[PAGE 8]
1991, slip op. at 5 n.5, *aff'd sub nom. Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992)(without published opinion), motion for leave to proceed *in forma pauperis* denied, 113 S.Ct. 593 (1992).[8]

Billings is attempting to improperly circumvent the preclusive and binding effects of his adverse OWCP and ECAB rulings under the FECA[9] through this separate and unauthorized action in a matter exclusively within the purview of the FECA. 5 U.S.C. §§ 8116(c) and 8128(b) (1988). *See Billings v. OWCP*, Case No. 91-ERA-0035, Sec. Fin. Dec. and Ord., Sept. 24, 1991, slip op. at 1-2 (dismissal of case against OWCP claims examiner for allegedly denying workers' compensation based on injuries allegedly suffered while working at TVA), *appeal dismissed sub nom. Billings v. Dole and TVA*, 956 F.2d 268 (6th Cir. 1992) (without published opinion).

IV. *Res Judicata as Bar to this Claim*

The law of *res judicata* is applicable to administrative proceedings when an agency is acting in a judicial capacity. *Astoria Federal Savings & Loan Assn. v. Solimino*, 501 U.S. 104, 107-08 (1991); *University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986); *U.S. v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2nd Cir. 1989); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 171-72 (1st Cir. 1987); *Barnes v. Oody*, 514 F.Supp. 23, 25 (E.D. Tenn. 1981); *see Stites v. Houston Lighting & Power Co.*, Case No. 87-ERA-41, Sec. Ord. of Dism., Sept. 29, 1989, slip op. at 3. Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The judgment precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

The Remand Decision stated that dismissal was justified because "the basis of [Billings'] complaint was the subject of the complaints in 89-ERA-16 and 90-ERA-18 and further litigation is barred by the principle of res judicata." *Id.* at 2. This was a reaffirmation of the ALJ's previous R. O. at 2. The ALJ is correct that his prior decisions in *Billings v. TVA*, Case Nos. 89-ERA-16 *et seq.*, R. D. and O., Nov. 1, 1990, raised the same FECA issues *vis-a-vis* Billings, TVA and OWCP presented in this separate proceeding. *Id.* at 1-2, 3 n.1. Although the substance of these FECA-related

issues was not specifically litigated in those prior consolidated cases, the R. D. and O. therein constitutes a judgment on the merits for *res judicata* purposes. That R. D. and O. was issued pursuant to FED. R. CIV. P. 41(b)[10] for failure to comply with the ALJ's prehearing orders, *id.* at 7, was subsequently affirmed by the Secretary, and Billings was denied review by the court of appeals. *See* n.4. A dismissal order issued under Rule 41(b) "operates as an adjudication upon the merits" unless the dismissal order specifies otherwise.[11] Therefore, this action is barred by the doctrine of *res judicata*. *Proctor v. Millar Elevator Service Co.*, 8 F.3d 824, 824-25 (D.C. Cir. 1993); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179-80 (4th Cir. 1989).

ORDER

For the foregoing reasons, the complaint in this case is dismissed with prejudice.

SO ORDERED.

David A. O'Brien, Chair

Karl J. Sandstrom, Member

Joyce D. Miller, Alt. Member

Washington, D.C.

[ENDNOTES]

[1] Secretary of Labor's Order 2-96 delegates to the newly established Administrative Review Board (ARB) jurisdiction to issue final agency decisions under this statute and these regulations, which have been amended to conform to the Secretary's Order. 61 Fed. Reg. 19,978-79 and 19,982-89 (May 3, 1996) (copy attached). The ARB has reviewed the interim decision of the Secretary, discussed *infra*, and reviewed the entire record in this case in rendering this final decision.

[2] Subsequent to the filing of briefs by Douglas E. Billings and the Tennessee Valley Authority (TVA) in response to the Secretary's briefing order under the former final adjudicatory procedure (*see* n.1), Karen Billings filed a motion to be substituted as the representative of her deceased husband. This motion is granted, 29 C.F.R. § 18.1(a), FED. R. CIV. P. 25(a), although the motion to substitute is arguably moot because our decision herein upholds the ALJ's various decisions and

orders. In any event, we have retained the name of the original plaintiff in the case caption for clarity, continuity, and ready reference.

[3] Billings' complaint named various TVA and OWCP employees, members of the Employees' Compensation Appeals Board (ECAB), and "Others not yet discovered." Billings' complaint is related to an ECAB proceeding captioned, *In the Matter of Billings and TVA, Watts Bar Nuclear Plant*, No. 88-1172 and 89-855, ECAB decision and remand order to OWCP, Aug. 7, 1990, slip op. at 8-9, 14. This ECAB decision was not specifically mentioned in his complaint.

[4] The ALJ's *res judicata* holding was predicated on his Nov. 1, 1990 Recommended Decision and Order (R. D. and O.) of dismissal for failure to comply with his pretrial orders and failure to prosecute in *Billings v. TVA*, Case Nos. 89-ERA-16 and 90-ERA-18. *See Billings v. TVA*, Case Nos. 89-ERA-16, 89-ERA-25, 90-ERA-2, 90-ERA-8, 90-ERA-18, Sec. Ord. of Rem., Jan. 9, 1992, for compliance with show-cause procedural requirements at 29 C.F.R. § 24.5(e)(4). The ALJ's subsequent Remand Decision, Feb. 26, 1992, reaffirming his prior R. D. and O, was upheld by the Secretary in *Billings v. TVA*, Case Nos. 89-ERA-16 *et. seq.*, Sec. Fin. Dec. and Ord., July 29, 1992 (also holding no basis for ALJ recusal), slip op. at 7, *review denied sub nom. Billings v. Reich and TVA*, 25 F. 3d 1047 (6th Cir. 1994) (without published opinion).

[5] Subsequent to the ALJ's order denying recusal or remand to the Wage and Hour Division, Billings' May 13, 1992 Response to Order to Show Cause first raised the issue of the adequacy of Wage-Hour's investigation. *Id.* at 1-2. Billings' Aug. 10, 1992 brief to the Secretary concerning the ALJ's Remand Decision also raised the issue of the adequacy of the investigation but only requested that the ALJ's decision "be Remanded back to the Administrative Law Judges' Offices [sic] for reassignment to another Administrative Law Judge for hearings in the matter." *Id.* at 5-6. As explained above, any arguable flaws in the investigation would not adversely affect his hearing rights.

[6] Billings' response to the show-cause order also urged that "the case [be] held off" because of the poor state of his health, as reflected in "[a] statement from [his] Cardiologist . . . as well as other medical rationale," submitted to the ALJ. *Id.* at 1-2. The ALJ is correct in finding that "the Plaintiff did not file a letter from his cardiologist or any other medical rationale' in this case as alleged." Remand Decision at 2.

[7] *See Rowland v. Easy Rest Bedding, Inc.*, Case No. 93-STA-19, Sec. Fin. Dec. and Ord., Apr. 10, 1995, slip op. at 1; *White v. "Q" Trucking Co., Alliance Trucking and Employment Services of Michigan*, Case No. 93-STA-28, Sec. Fin. Dec. and Ord., Dec. 2, 1994, slip op. at 2 (similar cases under employee protection provisions of the Surface Transportation Assistance

Act,
49 U.S.C.A. § 31105 (1994)).

[8] Since TVA's actions were in accordance with FECA regulations, it is unecessary to determine whether they "come within First Amendment protections," as the ALJ held. Remand Decision at 2; R. O. at 2. *See Queen v. TVA*, 508 F.Supp. 532, 536 (E.D. Tenn. 1980), *aff'd*, 689 F.2d 80, 86 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), concerning TVA's First Amendment argument in this case.

[9] *See* n.3 *supra* and surrounding text.

[10] *See* 29 C.F.R. §§ 18.1(a) and 18.29(a)(8).

[11] It is irrelevant under Rule 41(b) that the ALJ's orders in those consolidated cases were issued *sua sponte*. *Costello v. U.S.*, 365 U.S. 265, 286-87 (1961); *Carter v. City of Memphis, Tennessee*, 636 F.2d 159, 161 (6th Cir. 1980) (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962)); *Billings v. TVA*, Case Nos. 89-ERA-16 *et seq.*, R. D. and O. at 7.